

**MEMORANDUM***[signed and date stamped January 10, 2001]*

**SUBJECT: Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance**

**FROM: Barry Breen, Director /s/  
Office of Site Remediation Enforcement**

**Bruce Gelber, Chief /s/  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice**

**TO: Superfund Senior Policy Managers (Regions I-X)  
Regional Counsels (Regions I-X)  
Assistant Chiefs, Environmental Enforcement Section, United States  
Department of Justice**

**Introduction**

The Office of Site Remediation Enforcement (OSRE) and the United States Department of Justice (DOJ) strongly encourage and support ongoing regional efforts to clean up and resolve liability at Superfund sites that can then, in appropriate circumstances, be available for productive reuse. After completion of a federal cleanup under the EPA Superfund program, many Superfund sites have been returned to beneficial use. Historically, sites often remained underutilized or abandoned due to concerns of lenders, developers, and the general public about potential liability or residual contamination. As part of its overall effort to reform the Superfund program, the Agency has made a concerted effort to address this issue. Additionally, EPA works with other federal agencies and state and local governments that have made “Brownfields” redevelopment a major goal.<sup>1</sup>

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<sup>1</sup> EPA defines “Brownfields” as abandoned, idled, or under-used industrial or commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

The safe redevelopment of sites often occurs in the wake of a cleanup under EPA's Superfund program. Redevelopment benefits communities by ensuring a protective future property use and by replacing empty lots and abandoned facilities with new businesses, often bringing jobs and an increased tax base. Additionally, redevelopment efforts may provide other public benefits like parks, nature preserves, or playing fields for a community. Reutilization of formerly contaminated sites also furthers the Agency's commitment to "Brownfields" by encouraging property reuse, potentially preserving new undeveloped "Greenfields".

This document is part of a continuing EPA Region, OSRE, and DOJ effort to support and build on EPA's current successes in cleaning up contaminated sites so they can be returned to productive uses. One vehicle for facilitating the safe reuse of sites is Prospective Purchaser Agreements (PPAs). This Memorandum is intended primarily for regional attorneys and program staff involved in evaluating and negotiating PPAs, and for DOJ staff involved. It should also serve to expedite settlements by providing a common framework of analysis for EPA, DOJ, and prospective purchasers.<sup>2</sup> It must be read in conjunction with EPA's "Guidance on Agreements with Prospective Purchasers of Contaminated Property", dated May 24, 1995, (the "1995 PPA Guidance") and the October 1, 1999, memorandum from OSRE titled "Expediting Requests for Prospective Purchaser Agreements", both of which remain in effect.<sup>3</sup>

## **Background**

In an effort to promote the negotiation of PPAs, EPA issued the 1995 PPA Guidance, which partially superseded the previous 1989 policy titled "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property". The 1995 PPA Guidance expanded the circumstances in which EPA will enter into a PPA and has proven to be successful. Prior to its publication, EPA had entered into only 20 PPAs; between 1995 and December of 2000, EPA entered into more than 120 additional agreements.

In October 1999, OSRE issued a memorandum building on the success of the 1995 PPA Guidance by providing the Regions with a revised model PPA agreement and a sample cover letter and information request. The memo also announced the incorporation of a new PPA tracking system into the CERCLIS/WasteLAN database to ensure the Agency could evaluate its responsiveness to PPA requests. Additionally, it established a PPA expeditor at both EPA and DOJ to ensure PPA issues are

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<sup>2</sup> PPAs are entered into under the authority of the Attorney General of the United States to compromise and settle claims of the United States. Thus, PPAs can only be entered with the express concurrence of the Assistant Attorney General.

<sup>3</sup> The 1995 PPA Guidance, and the 1999 memorandum can be found on OSRE's Web page at <http://es.epa.gov/oeca/osre/ppa.html>.

identified and resolved quickly.<sup>4</sup>

In the five years since the 1995 PPA Guidance, the Agency has gained considerable experience in developing new approaches to resolving common issues that affect PPAs. Recently, the Agency established a workgroup of experienced staff, who in consultation with DOJ, developed this Memorandum to address these common issues by clarifying the 1995 PPA Guidance in two significant ways.

## **I. Clarification of Threshold Criteria For Entering Into PPAs**

Section III of the 1995 PPA Guidance identified five fundamental criteria for evaluating whether EPA should enter into negotiations for a PPA with a prospective purchaser. These five criteria are threshold issues that must be analyzed in order to determine if the Agency should expend its resources negotiating a PPA. Based on EPA's greater level of experience with PPAs, this document clarifies the first two of these threshold criteria and explains how they should be used in making the initial determination of whether EPA will enter into PPA negotiations.

### **Clarification of Criterion 1 - Federal Involvement or EPA Action at the Facility**

The first threshold criterion discussed in Section III of the 1995 PPA Guidance states that “[t]he Agency may consider entering into a PPA at sites listed or proposed for listing on the NPL, or sites where EPA has undertaken, is undertaking, or plans to conduct a response action.” In most instances, a PPA is not necessary for sites that do not require significant federal involvement. For example, at many Brownfields sites a PPA is not necessary because concerns of prospective buyers regarding contamination or liability can be successfully addressed through other mechanisms, such as environmental audits, private insurance, an indemnification agreement, an EPA Comfort/Status Letter,<sup>5</sup> or available state protections. However, in limited circumstances, the level of federal involvement at certain Brownfields sites may warrant the negotiation of a PPA. These sites may include those where assessments have been done pursuant to EPA's “Targeted Brownfields Assessment” grants program, EPA's “Brownfields Pilot Assessment” program, as well as sites where an assessment has been performed and the site is participating in EPA's Brownfields Cleanup Revolving Loan Fund.<sup>6</sup>

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<sup>4</sup> Presently, EPA's PPA expediter is Jack Winder at (202) 564-4292, and DOJ's expediter is Alan Tenenbaum at (202) 514-5409.

<sup>5</sup> EPA's Superfund Comfort/Status Letter Policy can be found at <http://es.epa.gov/oeca/osre> by clicking on Policy and Guidance Documents and then on Liability under CERCLA enforcement documents.

<sup>6</sup> Documents describing these programs and assessments can be found at the Brownfields Web site address at <http://www.epa.gov/swerosps/bf/html-doc>.

Generally, Regions should consider PPA requests for these types of sites only if other devices such as Comfort/Status Letters will not suffice and if sufficient information is known about the site to allow EPA to apply the 1995 PPA Guidance and this Memorandum. It is in the Region's discretion to determine if EPA's actions at these sites constitute "federal involvement" sufficient to warrant negotiating a PPA.

#### Clarification of Criterion 2 - "Direct and Indirect Benefits"

The second threshold criterion in Section III of the 1995 PPA Guidance states that "[t]he Agency should receive a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA." However, the definition and use of the terms "direct and indirect benefits" in the 1995 PPA Guidance is potentially confusing on two points involving the application of this threshold criterion.

First, the definition of the term "indirect benefits" in the 1995 PPA Guidance included examples of benefits that should be considered "direct benefits" to EPA. Thus, this Memorandum includes the following new definitions of the two terms. The new definitions should be substituted wherever the terms are used in the 1995 PPA Guidance.

##### "Direct Benefits"

In using the term "direct benefits" EPA refers to all the ways a PPA will further CERCLA's mandate of protecting human health and the environment. "Direct benefits" obviously include cleanup work and cost recovery payments. However, they also include any other activities that advance EPA's CERCLA objectives. Actions such as guaranteed site access for regulatory personnel and cleanup contractors, controlling or limiting public access and exposure to the site, institutional controls, and any actions that help facilitate or maintain a remedy, such as demolishing unsafe structures, may be considered "direct benefits". Additional examples include actions that may streamline the cleanup or reduce the cost of the remedy, restore, preserve, or mitigate damages to natural resources, or in any way further reduce the current or future risks posed by the site.

##### "Indirect Benefits"

In using the term "indirect benefits" EPA means additional ways a PPA may benefit the public or a community that are outside EPA's statutory CERCLA mandate to protect human health and the environment by responding to a release, or a substantial threat of a release, into the environment. Examples are the creation or retention of jobs, increasing the tax base, or the

building of a park, library, or a community center.<sup>7</sup>

Second, the 1995 PPA Guidance may be read to suggest that an analysis of a potential PPA's "indirect benefits" is applied to both the threshold question of whether EPA should expend its resources to negotiate a PPA, and also to the determination of what is adequate consideration for entering into a PPA. This Memorandum clarifies that "indirect benefits", as redefined above, should be evaluated only as part of the initial threshold analysis under the second criterion of Section III of the 1995 PPA Guidance regarding whether the Agency should expend resources negotiating a PPA and not as part of the consideration analysis for PPAs.<sup>8</sup>

## **II. Clarification of the Consideration Analysis**

In evaluating adequate consideration for entering into a PPA, EPA recognizes that a prospective purchaser of a Superfund site is not a liable party under CERCLA except as a result of its purchasing the property. However, the Agency also recognizes that entering into a PPA affects EPA's ability to enforce its CERCLA Section 107(l) lien and may impair its ability to recover its response costs.<sup>9</sup> This part of the Memorandum is intended to assist Regions in balancing these points. The goal is to structure the PPA so that neither the buyer or seller of the property receives an unfair windfall at taxpayer expense.<sup>10</sup>

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<sup>7</sup> However, if the park, library, or community center was constructed in a manner that actually reduced future risks at a site, for example a parking lot substituted for part of a remedy as an effective soil cap, the activity should be considered a "direct benefit" to the extent it reduces the cost of the remedy.

<sup>8</sup> "Indirect benefits", as redefined above, are not taken into account when analyzing the amount of consideration EPA requires for a PPA because such benefits may not accrue to the Agency.

<sup>9</sup> The lien provision is designed to facilitate the United States' recovery of response costs and prevent windfall. The legislative history states that the lien provision was added to "enable the United States to recover its response costs through an in rem action against the real property that is the subject of the response action. Such protection for the United States will also enable it to recover the increase in land value resulting from the response action, thus preventing unjust enrichment of the owner." S. Rep. No. 99-11, at 45 (1985); see also H.R. Rep. No. 99-253, at 17 (1985) ("Response actions may cause substantial increases in the value of the land on which these actions are taken. Thus, the purpose of these liens is to ensure that the owners of the property where a cleanup has occurred will not receive a windfall profit as a result of the cleanup.")

<sup>10</sup> The case team should generally ensure that the seller does not receive significant proceeds from the sale which it could disburse or shelter, preventing the Agency from recovering the funds. Likewise, as set forth in this Memorandum, the case team should also ensure that the consideration

Section IV of the 1995 PPA Guidance included a brief discussion of some factors that may be analyzed in determining appropriate consideration. Based on the Agency's experience in implementing that Guidance, this Memorandum provides a new expanded list of factors below and provides the following general framework for assessing them.

First, obtain a reliable estimate of what the market value of the property would be if the cleanup were complete. In most cases this estimate should be based on a real estate appraisal by a trained professional. However, there may be circumstances where other mechanisms such as a tax appraisal or sufficient information from professional real estate brokers involved in an "arms-length" transaction may suffice. The appraisal should take into account the costs a purchaser will incur to maintain the protectiveness of the remedy or to bring the property into compliance with federal, state or local health and safety requirements. Whether the property will have a limited future use or reduced productivity as a result of the anticipated final cleanup should also be factored into the appraisal.

Second, determine whether the property is encumbered with liens that have a superior status to EPA's CERCLA Section 107(l) lien. Care should be taken to ensure that previously filed private party liens are legally valid. For the purposes of determining consideration, EPA's final fair market estimate of what the property is worth should generally take into account the amount necessary to pay off validly held superior liens.

Finally, using the estimated value of the property derived above as a starting point, analyze the other consideration factors listed below that may be appropriate to the site.<sup>11</sup> As every site and every potential PPA is unique, not every listed factor may warrant consideration. In explicit recognition of the flexibility necessary to ensure that each PPA is fairly negotiated, the factors are not weighted in any prescribed manner. It is left to the assigned case team to determine how best to balance the various factors to determine what is fair and appropriate consideration for a PPA. It is anticipated that the basic framework set forth above will provide structure for an analysis of these factors. Consideration factors may include:

#### Market Conditions

- what is the nature of the property and the local market;
- is there likely to be more than one prospective future buyer;

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received by EPA for the PPA prevents the buyer from receiving an unfair windfall.

<sup>11</sup> Section IV of the 1995 Guidance specifically mentioned "coupling" an analysis of the consideration factors with "an examination of any indirect benefits that the Agency may receive". Also, Section V of the 1995 Guidance starts with the clause "In light of EPA's new policy of accepting indirect benefits as partial consideration...". As discussed above "indirect benefits" may not accrue to EPA and should be considered as a threshold criterion and not as a consideration factor.

- if EPA does not enter into the PPA what is the likelihood there will be another buyer that will make a substantially better offer before EPA's lien is extinguished;
- is there sufficient incentive for the parties to go forward with the transaction given EPA's consideration request;
- if the consideration offer for the PPA is accepted by EPA, will either the seller or buyer receive a significant unfair windfall at taxpayers expense<sup>12</sup>;
- does the continuing cleanup or remedy impede the use of the property in the short term so that its current value is likely to be less than its final clean value;
- are there greater transaction costs or burdens facing the buyer that it would not have if it purchased another property such as a "Greenfield";

#### Cost Analysis and Consideration of Enforcement Options

- the amount of past and anticipated future costs in cleaning the site;
- whether there are other viable responsible parties whose anticipated contribution to the cleanup work or response costs should be taken into account;
- the legal risks, if any, associated with enforcing the CERCLA Section 107(l) lien in an "in rem" legal action;
- the EPA resources necessary to enforce the lien or to reach a different PPA settlement with another buyer;

#### Reduced Risks to Public Health and the Environment

- the benefit of any "direct benefits" (as redefined above) associated with the PPA;
- any benefits associated with ensuring the safe reuse of the property where the threat to human health or the environment could be aggravated by its abandonment.

Again, not every listed factor is relevant to a particular consideration analysis, and the list, while based on EPA's experience with PPAs over the years, is also not necessarily comprehensive. Regions may consider other site specific factors as appropriate.

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<sup>12</sup> There may be limited instances where a buyer intends to use the property for less than its highest possible use. For example, where a non-profit organization or municipality purchases the property for permanent preservation purposes the buyer may not be receiving a significant unfair windfall. However, even though EPA should therefore not determine consideration based on an unfair windfall in such circumstances, EPA must still consider other relevant factors set forth in the Memorandum in determining appropriate consideration. Thus, EPA still needs to consider, among other things, the market value of the property and the likelihood of being able to recover that value from another buyer.

In addition, because the overall benefits of a PPA to EPA and a local community can be substantial, Regions should ensure that analysis of the consideration factors is done in a timely fashion and that PPAs do not become delayed over minor amounts or issues<sup>13</sup>.

### **III. EPA's new PPA Web Page**

Finally, OSRE is pleased to announce the completion of a new Web page that includes examples of finalized PPAs. The site can be found at <http://es.epa.gov/oeca/osre/ppa.html>. The page provides regional staff and the public with ready access to examples of recent PPAs.

\* This Memorandum and any internal procedures adopted as a result of its implementation are intended solely as guidance for employees of the EPA and creates no substantive rights for any persons. Case specific inquiries should be directed to Helen Keplinger in OSRE's Regional Support Division at (202) 564-4221. General questions regarding the policy should be directed to Greg Madden in the Policy and Guidance Branch at (202) 564-4229.

cc: Susan Bromm (OSRE)  
Paul Connor (OSRE/PPED)  
Sandra Connors (OSRE/RSD)  
Lori Boughton (OSRE/PPED)  
Jack Winder (OSRE/RSD)  
Bruce Kulpan (OSRE/RSD)  
Earl Salo (OGC)  
Steve Luftig (OSWER)  
Elaine Davies (OSWER)  
Larry Reed (OSWER)  
Linda Garczynski (OSWER/OSPS)  
Alan Tenenbaum (EES/ENRD/DOJ)  
PPA Workgroup

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<sup>13</sup> There is a Government Performance Results Act (GPRA) requirement that Regions evaluate PPA requests and complete negotiations in a timely fashion.